NO. 46385-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JARED SCHAUBLE

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Garold E. Johnson, Judge

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
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A. ARGUMENT IN REPLY

THE PRIOR INCIDENT SHOULD HAVE BEEN EXCLUDED BECAUSE IT WAS FAR MORE LIKELY TO SHOW PROPENSITY THAN ANY PLAN OR DESIGN.

A common scheme or plan need not be completely unique, but it must be indicative of different instances of implementing the same plan. State v. Gresham, 173 Wn.2d 405, 422, 269 P.3d 207 (2012). There must be some similarity beyond a mere propensity to commit a given crime. See id. at 420 (ER 404(b) is a categorical ban on prior bad acts used to show propensity). The similarities must be marked and substantial. Id. at 422. The evidence must show conduct by design rather than coincidence. State v. Kennealy, 151 Wn. App. 861, 887, 214 P.3d 200 (2009) (citing State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995)); State v. Sexsmith, 138 Wn. App. 497, 505, 157 P.3d 901 (2007).

Otherwise, the risk is too great that evidence of past misconduct will be used for the forbidden purpose of propensity. See State v. Slocum, 183 Wn. App. 438, 442, 333 P.3d 541, 543 (2014) (discussing risk the defendant will be found guilty "because of the jury's overreliance on past acts as evidence of his character and propensities"). That risk is at its greatest when sex offenses are at issue. Id. (citing Gresham, 173 Wn.2d at 433).

The State discusses numerous cases in which prior incidents have been found admissible under the common-scheme-or-plan exception to ER

404(b)'s ban on evidence of prior bad acts. All of them are far more similar than the 2008 incident in this case.

For example, in Kennealy, the court held the trial court did not abuse its discretion in admitting Kennealy's prior molestation of his daughter and three nieces during his trial for molesting three children in his apartment complex. 151 Wn. App. at 868-69, 875-76, 888-89. First, even without discussing the similarities between Kennealy's conduct in each instance, the case involved charged offenses against three children and prior offenses against four other children. Id. Thus, his conduct was repeated at least seven times. This is far more indicative of a common plan, and far less likely to be coincidence or mere propensity when it occurred so many times.

Additionally, in Kennealy, the court relied on the fact that Keneally preyed on children to whom he had relatively easy access and who trusted him, either because they were family members or because they lived in his apartment complex and he gave them gifts. Id. at 889. A commonality between some of the charged and prior offenses was that he instructed the victims not to say anything. Id. In all cases his victims were between the ages of five and twelve. Id. With most of the victims, he committed sexual acts more than once. Id. The sexual contact with the girls involved touching the vagina both inside and outside of their clothing. Id. In total, the court listed seven different aspects of the common scheme or plan. Id.

State v. Krause, 82 Wn. App. 688, 690-92, 919 P.2d 123 (1996), also involved charged offenses against two young boys and prior offenses against four similarly aged boys. As in Kennealy, the mere frequency of the repetition adds significantly to the idea of a common plan and cuts against a finding of coincidence. Again, the court noted numerous similarities such as ingratiating himself with the child's parent, then gaining the child's affection by playing games and taking them on outings, and then engaging in similar sexual conduct. Krause, 82 Wn. App. at 694-95.

By contrast, in this case, Schauble was involved in a lengthy sexual relationship with one 15-year old girl. All current charges arose from this one relationship. The sole prior incident also involved a lengthy relationship with one person, a 14-year-old girl. Schauble's attraction to two teenaged girls is not a common scheme or plan.

Here, the only similarities are so general as to be coincidental or relate solely to a propensity for sexual contact with teenaged girls. As the trial court noted, endearing oneself to a young person is "emblematic" of the crime involved. RP 85-86. At trial, the state described the so-called common scheme as a plan to "endear oneself to young women in order to have sex." RP 119. That is not a common scheme or plan; it is an incident of the nature of the crime.

Contrary to the State's assertion, the "lure of alcohol and partying with adults" was *not* a common feature of the two offenses. In the current case, Schauble apparently plied K.K.-T. with alcohol; but in the 2008 offense, there was no mention of alcohol. RP 308-46. During the current charges, there was no evidence Schauble used a party to lure K.K.-T. And the party planned in the 2008 offense appears to have been a cover so that Schauble and the girl could meet, not an inducement to do so. RP 326-28.

Given ER 404(b)'s categorical ban on use of prior offenses to show criminal propensity, and the high risk, particularly in sex offense cases, that the jury will draw the forbidden inference, courts have repeatedly urged extreme caution in admitting such evidence. "The trial court must presume that evidence of prior bad acts are inadmissible and decide in favor of the accused when the case is close." Kennealy, 151 Wn. App. at 886; see also State v. Sutherby, 165 Wn.2d 870, 886-87, 204 P.3d 916 (2009) ("In cases where admissibility is a close call, the scale should be tipped in favor of the defendant and exclusion of the evidence."). The court did not exercise appropriate caution here, and this Court should reverse Schauble's convictions as the result of unfairly prejudicial propensity evidence admitted at his trial.

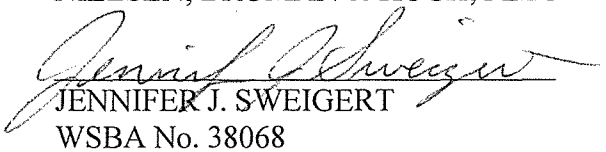
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Schauble requests this Court reverse his convictions.

DATED this 26th day of February, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF FEBRUARY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JARED SCHAUBLE
DOC NO. 319878
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONELL, WA 99322

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF FEBRUARY 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

February 26, 2015 - 1:55 PM

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